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The Effect of Accepting a Worthless Check Where the Parties Contemplate a Cash Sale

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NOTES

THE EFFECT OF ACCEPTING A WORTHLESS CHECK WHERE THE PARTIES CONTEMPLATE A CASH SALE

The term "cash sale" when used in its technical sense means a simultaneous exchange of the possession and title of goods for the purchase price.[1] Distinguishable from this kind of sale are those (1) where title passes but possession is retained until payment of the price, which might be termed a "sale with lien reserved," and (2) where possession passes but title is retained, which using the term broadly, might be called a "conditional sale."[2] Since it is practically impossible to make an absolutely contemporaneous exchange of the goods for the price, most courts hold that a sale does not lose its character as a "cash sale" if the parties have manifestly agreed to regard the exchange as coincidental, and the delay is no greater than the circumstances require.[3] But where the goods are delivered and the price is not simultaneously paid, certain circumstances such as (a) the extension of credit by agreement or usage,[4] (b) the delivery of the goods without mentioning payment,[5] or (c) the failure to promptly reclaim possession[6] may operate as a waiver of the contemporaneous cash payment.[7]

I

Where the bargain contemplates a technical cash sale and payment is by check which proves to be worthless, the deter-

[1] Williston, Sales (2 Vols. 1924), sec. 341.

[2] Ibid.

[3] For example, where the seller is to make delivery directly to the buyer and the goods are to be paid for when delivered, or where the goods are bulky—such as coal and lumber, or where there is to be an inspection or verifying of accounts, there may be a necessary delay between the time of handing over the goods and the payment of the price; and yet the transaction may remain a technical "cash sale". See Leven v. Smith, 1 Denio 571 (N. Y. 1845); Burns v. Bigelow, 122 N. Y. S. 255 (1910); Rehr v. Trumbull Lumber Co., 110 Ohio St. 218, 143 N. E. 558 (1924); Vold, Handbook of the Law of Sales (1931) 172, 173. For a criticism of this view see Williston, *op. cit. supra*, sec. 343, 346, n. 1.

[4] Haskins v. Warren, 115 Mass. 514 (1874); Maley-Thompson & Moffett Co. v. Thomas Forman Co., 179 Mich. 548, 146 N. W. 95 (1914).

[5] Haskins v. Warren, 115 Mass. 514 (1874).

[6] French v. Lewis, 218 Pa. 141, 67 Atl. 45 (1907). But see note (1931) 36 Dick. L. Rev. 276 at 279–282.

[7] Note 11 L. R. A. (N. S. 1908) 948; Vold, *op. cit., supra* n. 3, 172, 173.

mination of the ownership of the goods may raise the question of whether the simultaneous cash payment has been waived. In one line of cases the solution of the problem of waiver is based on the theory that a check is *conditional payment* only,[8] unless it is accepted as absolute.[9] So, if the seller delivers the goods and takes the purchaser's check for the price, the check does not constitute payment until it is honored and the bargain has not lost its character as a true cash sale. If then, the check is dishonored the seller has not lost ownership in the goods and may recover them from the original buyer.[10] As the latter was never vested with any title the seller may recover the goods even from a *bona fide* purchaser for value.[11] But where a worthless check was taken as payment and the vendor gave the vendee possession and a negotiable bill of lading or warehouse receipt representing the goods, the vendor was estopped from claiming ownership as against a *bona fide* subvendee who purchased in reliance on the vendee's muniments of title.[12] Similarly, if there has been an unreasonable delay by the original seller in presenting the dishonored check for payment, the

[8] Mariash, Law of Sales (1930) 120; 23 R. C. L. 1388; 55 C. J. 520, 579.

[9] Goddard Grocer Co. v. Freedman, 127 S. W. (2d) 759 (Mo. App. 1939) (Alternative holding); Vold, *op. cit. supra*, n. 3, p. 174; Mariash, *op. cit. supra*, n. 8, p. 121; 55 C. J. 579.

[10] Note 31 A L. R. 578, 579–581 (1924); Vold, *op. cit. supra* n. 3, p. 174; Note 24 Geo. L. J. 165, 172 (1935); 55 C. J. 579.

[11] Barksdale v. Banks, 206 Ala. 569, 90 So. 913 (1921); Clark v. Hamilton Diamond Co., 209 Cal. 1, Pac. 915 (1930); Galeppi v. C. Swanston & Son, 107 Cal. App. 30, 290 Pac. 116 (1930); Chafin v. Cox, 147 S. E. 154 (Ga. App. 1929); National Bank of Com. v. Chicago, Burl. & N. Ry., 44 Minn. 224, 46 N. W. 342 (1890); Gustafson v. Equitable Loan Assn., 186 Minn. 236, 243 N. W. 106 (1932), noted in 17 Minn. L. Rev. 105; Johnson v. Iankovetz, 57 Ore. 24, 110 Pac. 398 (1910); Young v. Harris-Cortner Co., 152 Tenn. 15, 268 S W. 125 (1924); John S. Hale & Co. v. Beley Cotton Co., 154 Tenn. 689, 290 S. W. 944 (1927); Note, 54 A. L. R. 526 (1928). Contra; Parr v. Helfrich, 108 Neb. 801, 189 N. W. 281 (1922); Comer v. Cunningham, 77 N. Y. 391 (1879) semble; Note 31 A. L. R. 578, 581; see, Chadd v. Byers State Bank, 111 Kan. 279, 206 Pac. 880, 881 (1922); Boyd v. Bank of Mercer Co., 174 Mo. App. 431, 160 S. W. 587, 588 (1913); Morehouse v. Keyport Auto Sales Co., 118 N. J. Eq. 368, 179 Atl. 279, 280-281 (1935); Ditton v. Purcell, 21 N. D. 648, 132 N. W. 347, 349 (1911); C. M. Keys Comm. Co. v. Beatty, 42 Okla. 721, 142 Pac. 102, 1103 (1914); Lee v. Marion Natl. Bank, 167 S. C. 169, 166 S. E. 148, 160-161 (1932).

[12] Ammon v. Gamble-Robinson Comm. Co., 111 Minn. 452, 127 N. W. 448 (1910) (warehouse receipt); Johnson-Brinkman Comm. Co. v. Central Bank, 116 Mo. 558, 22 S. W. 813 (1893) (bill of lading); Parma v First Natl. Bank (Comm. of App. Tex.) 63 S. W. (2d) 692 (1933) (bill of lading).

equitable defense of laches may prevent him from asserting his title to the goods against an innocent subpurchaser.[13]

II

Professor Williston believes the decisions are unsound which hold that a check is conditional payment and that no property in the goods is transferred until the check is paid.[14] He urges that there "has been confusion of thought in supposing that the condition in conditional payment by means of negotiable paper has any reference to the ownership of property given in exchange for the paper."[15] His contention is that the seller has assented to the transfer of ownership in the goods, for at the time of the delivery no restriction is placed on the purchaser's use of the goods nor even on his right to transfer them. This reasoning appears to be sound.

The common law of sales has been codified in the Uniform Sales Act, and the following provisions relate to the instant problem:

"Section 18—(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.[16]

Section 19. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."[17]

Though in the early law of sales it was presumed that unless there was an agreement for the extension of credit the transaction was a cash sale,[18] it seems clear that under the above sections of the Sales Act the presumption is now that unless a contrary intention affirmatively appears, the property in specific goods passes at once regardless of when payment is to be

[13] Pohl v. Johnson, 179 Minn. 398, 229 N. W. 555 (1930); Oldridge v. Sutton, 157 Mo. App. 485, 137 S. W. 994 (1911); see Goddard Grocer Co. v. Freedman, 127 S. W. (2d) 759, 762 (Mo. App. 1939).

[14] Williston, *op. cit. supra*, n. 1, sec. 346a. The same material is found in Williston, Law of Contracts (Rev. ed., 8 Vols. 1936) sec. 732.

[15] Ibid.

[16] Ky. Stat. (Carroll's 1936) sect. 2651b-18.

[17] Id., sec. 2651b-19.

[18] Vold, *op. cit. supra* n. 3, p. 176; Williston, *op. cit. supra* n. 1; sec. 342, 343.

made. Actually, when a check is exchanged for goods the parties do not ordinarily have any conscious intent. The seller intends for the buyer to use the goods as his own, but expects to receive payment.[19] He does not consider the check as absolute payment, but regards it as a means of obtaining his money; so in reality the seller is extending credit to the buyer for a short period.[20] Any argument that the intention of the seller is to retain the ownership of the goods until the check is paid seems untenable. Then in the light of the provisions of the Uniform Sales Act the property in the goods passes to the buyer when the goods are delivered and the check is given for the purchase price.[21]

Upon examination of the cases[22] holding that the original vendor may reclaim the goods from an innocent subvendee when the original vendee has given a worthless check for the price, it is noticed that in only two of them the Sales Act had been adopted by the state in which the case arose.[23] The court of Minnesota had held, prior to the adoption of the Act, in *National Bank of Commerce* v. *Chicago, Burl. & N. Ry.*[24] that the vendor could recover the goods from an innocent subvendee when the original vendee had given a worthless check as payment. In the first case[25] decided after the Sales Act was embodied in the Minnesota statutes the court ignored the Act and relied on the previous case as authority. The Tennessee court in *Young* v. *Harris-Cortner Co.*[26] reached the same result, relying on the earlier Minnesota decision, but referred to Sections 18 and 19 of the Uniform Sales Act, *supra,* and quoted a part of section 343 of Prof. Williston's *Treatise on Sales.*[27] Apparently it misunderstood the view expressed by Prof. Williston, and it is submitted that the court erroneously interpreted the Sales Act.

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[19] 13 Ore. L. Rev. 177, 178 (1933).
[20] 38 Yale L. J. 1154 (1929).
[21] 13 Ore. L. Rev. 177 (1933); 4 St. Johns L. Rev. 85 (1929).
[22] See cases cited, *supra* n. 11.
[23] Ala., Calif., Ga., and Ore. had not adopted the Sales Act at the time the cases cited in n. 11 were decided, but Oregon later adopted it. Minn. adopted the Act in 1917 and Tenn. in 1918.
[24] 44 Minn. 224, 46 N. W. 342 (1890).
[25] Gustafson v. Equitable Loan Assoc., 186 Minn. 236, 243 N. W. 106 (1932), noted in 17 Minn. L. Rev. 105.
[26] 152 Tenn. 15, 268 S. W. 125 (1924).
[27] *Supra* n. 1.

III

The decisions holding that a check is only conditional payment and that title to the goods does not pass until the check is honored seem to be a result of a sympathy for the seller, and of the belief that a contrary rule would result in the decreased transferability of goods. Such an attitude is expressed in *Young* v. *Harris-Cortner Co., supra,* where the court said:

"We feel safe in saying that as a matter of custom and convenience, most of the cash transactions of the country are paid with checks. A farmer brings his cotton, tobacco or wheat to town for sale and sells same, and, as a general rule, is paid by check, although all of such sales are treated as cash transactions. If, in such a case, the purchaser can immediately resell to an innocent party and convey good title, it would follow that vendors would refuse to accept checks and would require the actual money, which would result in great inconvenience and risk to merchants engaged in buying such produce since it would require them to keep on hand large sums of actual cash. This would result in revolutionizing the custom of merchants in such matters."[28]

But the same line of reasoning might well be advanced for protecting the interests of an innocent subvendee.[29] Under the theory of the *Harris-Cortner Co.* case it would be necessary for the buyer either to determine whether any prior vendee had given a false check in exchange for the goods about to be purchased, or else accept the risk of having the goods reclaimed. Surely such a requirement could not be said to increase the transferability of goods.

The use of checks as payment in business transactions benefits both the buyer and the seller. If the buyer may pay for his purchases by check it is unnecessary for him to keep large amounts of money in his possession. But it is to the seller's advantage to accept checks instead of money as payment, for his sales are thereby increased, as well as his commissions or profits. Then if the rule be adopted that the vendor transfers the ownership in the goods when he accepts a check in a sale, it would be to the vendor's own interests to continue the practice. It seems only fair that the seller should assume the risk of receiving an occasional worthless check, since the increased profits would exceed the losses. In any specific instance should the seller be unwilling to take the risk of accepting the prospective purchaser's check, he may demand cash on delivery

[28] 152 Tenn. 15, 268 S. W. 125, 127 (1924).
[29] See Vold, *op. cit. supra* n. 3, 379, where he gives the reasons for protecting a b.f.p. in cases of fraud.

without losing the sale by using a public carrier. So the negotiability of goods would not be diminished by holding that the property in the goods is transferred when a check is given in exchange for them.

The theory that no title passes where the parties contemplated a cash sale and payment was by a worthless check and that the goods could therefore be recovered from a *bona fide* subvendee, seems to have been found not entirely satisfactory by at least one state which adopted it. In *Chafin* v. *Cox*[30] the Georgia court followed the above theory and refused to protect an innocent subpurchaser. But in *Brumby Chair Co.* v. *City of Columbus*,[31] decided three years later, the appellate court apparently recognized that the result reached in the earlier decision was not the most desirable. In the latter case the original vendee gave a check for furniture and resold it to an innocent third party. The check was dishonored when presented by the original vendor, but the court held that he could not recover the goods from the innocent subvendee, on the ground that it was a *conditional sale* and the contract of sale was not in writing and recorded as provided in the Conditional Sales Statute of Georgia. This conclusion is in accord with Prof. Williston's contention that even though the parties have agreed that the seller should not give up his title until the price is paid, it is still true that the delivery and permission to the buyer to use the goods as his own is inconsistent with the theory of a cash sale. Instead a conditional sale has been substituted and the transaction should be dealt with according to the rules governing conditional sales.[32]

When a check is returned unpaid to the seller he has, of course, an action at law for the price. If the check is given with intent to defraud, under Prof. Williston's theory, the buyer has a voidable title[33] and the seller may rescind the contract and reclaim the goods, unless they are in the hands of a *bona fide* purchaser for value.[34] The view that the seller transfers the property in the goods when a worthless check

[30] 147 S. E. 154 (Ga. App. 1929).
[31] 46 Ga. App. 163, 167 S. E. 221 (1932).
[32] Williston, *op. cit. supra* n. 1, sec. 346; see also sec. 346b.
[33] Williston, *op. cit. supra* n. 1, sec. 346a.
[34] Uniform Sales Act, sec. 24; the corresponding section in the Ky. Stat. (Carroll's 1936) is 2651b-24.

is given for the price was adopted in an English case,[35] in which the court refused to allow the seller to reclaim the goods from an innocent subpurchaser. There is some American authority in support of that doctrine.[36] It is admitted that in a number of the worthless check cases there is no actual fraud, as for example where the buyer is merely careless and overdraws his checking account. In such cases the better rule seems to be that the seller would have assumed the risk of relying on the original vendee's credit should his check be dishonored.

IV

No Kentucky cases were found deciding whether property in goods passes in a sale where the seller accepted a worthless check. In *Arnett* v. *Cloudas*[37] the vendor accepted counterfeit money as the purchase price of a slave, and executed a bill of sale to the vendee. The court refused to allow the seller to recover the slave from a *bona fide* purchaser, basing its decision on two grounds: (1) the slave was obtained by fraud, but the contract could not be avoided after an innocent third party had bought it; (2) the seller had given the buyer possession of the chattel and the muniments of title. However, the language of the court indicates that the same result would have been reached even though a bill of sale had not been delivered to the original vendee. It seems possible to distinguish between counterfeit money and a worthless check. When a seller receives money in a cash sale he does not regard the buyer as issuing it, but accepts it without any condition as payment of the purchase price. On the other hand when a check is given for the price the seller looks to the maker of the check for its payment, and accepts it as something that can subsequently be converted into money.

[35] Phillips v. Brooks, Ltd. 1919 (2) K. B. 243 (forged check).

[36] Parr v. Helfrich, 108 Neb. 801, 189 N. W. 281 (1922) (forged check); Comer v. Cunningham, 77 N. Y. 391 (1879) (payment remanded); Ditton v. Purcell, 21 N. D. 648, 132 N. W. 347 (1911) (dishonored checks); Mariash, *op. cit. supra* n. 8, p. 535, (In the first case cited and in the English case cited in n. 34 the check involved was forged, but there seems to be no valid distinction between a forged check and a "cold" check in the determination of the ownership of the goods. In either case the seller has the same intention; there is however the added factor of mistaken identity of the drawer, when the check is forged, which gives the seller the remedy of rescission except as against a b.f.p.)

[37] 34 Ky. 299 (4 Dana 1836).

In *Carter* v. *Richardson*[38] the vendee attempted to establish a *bona fide* purchase for value from a vendor who had sold him a stock of goods with the intent to defraud his creditors. The transaction was apparently understood by the parties to be a cash sale and the buyer gave his check for the price; but the court said that the check was not in itself payment, and that the buyer had learned of the fraud in time to countermand payment of the check before its presentation. In a later Kentucky case[39] the premium on a fire policy was paid by a check which was dishonored. The company wrote the insured a letter directing him to return the policy and his check would then be returned. The insured property was destroyed before the letter was received, but it was held that the insurer was not liable. Though this case did not involve the transfer of title to property the court's opinion contains this statement:

"Under the head of Sales, with reference to the payment of the purchase price by check, the rule is thus written in 23 R. C. L., page 1388; 'The acceptance of a buyer's check is not regarded as payment but only as conditional payment, and if the check is dishonored on due presentation the seller's right to reclaim the property is not lost.' "[40]

The last two decisions seem to subscribe to the theory that a check is only conditional payment, and the *dictum* in the latter case indicates that the court might allow a vendor to reclaim the property, at least from the original vendee.

If an invalid check and counterfeit money are distinguishable, it appears that the Kentucky court is not *bound* by prior decisions to follow either the view held by Prof. Williston or the theory that where the parties have contemplated a cash sale, accepting a worthless check does not pass title to the goods until the check is paid. The theory that a check is only conditional payment does not necessarily lead to the conclusion that title has not passed when the goods are exchanged for the check. But assuming that there are no Kentucky cases deciding the problem under discussion, it is submitted that the adoption of the Uniform Sales Act by the General Assembly,[41] makes it necessary under sections 18 and 19 of that act for the

[38] 22 Ky. L. Rep. 1204, 60 S. W. 397 (1901).

[39] Ratliff v. St. Paul Fire Insurance Co., 207 Ky. 492, 269 S. W. 546 (1925).

[40] Id. at 495, S. W. at 547.

[41] Kentucky Acts (1928) c. 148, p. 481.

Kentucky Court to adopt the view as expressed by Prof. Williston.

CONCLUSION

Should the question arise, it is submitted that the Kentucky Court should adopt the rule that the ownership is transferred to the buyer when he gives a check in exchange for the goods, unless there is an affirmative manifestation of a contrary intention. Further, if such a contrary intention is affirmatively shown the transaction is not a "cash sale" since the title would be withheld, and therefore any laws requiring the recording of conditional sales contracts[42] must be complied with before the goods could be reclaimed from a *bona fide* purchaser. (For value without notice.) It is believed that this rule should be applied because:

1. It is supported by sound legal reasoning;
2. The plain meaning of the Uniform Sales Act makes the adoption of the rule necessary if any effect is to be given to that statute;
3. The economic interests of the general public would be better served by its operation.

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[42] Though Kentucky has not adopted the Uniform Conditional Sales Act, the court held in Munez v. National Bond & Investment Co., 243 Ky. 293, 47 S. W. (2d) 1055 (1932), that unless conditional sales are recorded they shall be void as to any purchaser from the original vendee, if that purchaser acquires the goods in good faith, for value, and without notice. See Simeon S. Willis, *Uniform and Conditional Sales*, (1934) 22 Ky. L. J. 278.